

SERVED: September 11, 2006

NTSB Order No. EA-5249

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of September, 2006

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17415
v.)	
)	
DOUGLAS R. ZINK,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the written initial decision and order of Administrative Law Judge Patrick G. Geraghty in this matter, issued November 30, 2005.¹ By that decision, the law judge affirmed the Administrator's Amended Order of Suspension for violations of 14 C.F.R. §§ 91.7(a)² and 91.407(a)(2),³ and

¹ The law judge's order is attached.

² Section 91.7(a) restricts operation of a civil aircraft unless

imposed a 40-day suspension against respondent's airline transport pilot certificate.⁴ We deny respondent's appeal.

The complaint alleged that respondent operated an Aerospatiale SA315B Eurocopter with unapproved major alterations,⁵ and without the required maintenance entries. After respondent answered the Administrator's complaint (denying all alleged violations and presenting five affirmative defenses), the Administrator served a discovery request that included a Request for Admissions of the key allegations in the complaint. Upon not receiving a substantive reply to this discovery request,⁶ and after withdrawal of respondent's counsel,

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the aircraft "is in an airworthy condition."

³ Section 91.407(a)(2) precludes operation of any aircraft that has undergone alteration unless the aircraft's logbook contains the required maintenance record entry.

⁴ The Administrator's complaint included an alleged violation of 14 C.F.R. § 91.405(b). However, the Administrator withdrew this allegation prior to the motion for summary judgment, and, on that basis, the law judge modified the 60-day suspension sought by the Administrator to a 40-day suspension. We do not consider the § 91.405(b) charge in our analysis.

⁵ The Administrator's complaint alleged that respondent's aircraft had the following unapproved major alterations that rendered the aircraft unairworthy: "skid wipes"; "a mirror on the right aircraft skid"; "a tail rotor peddle"; "a bubble window [on] the pilot's door"; and "a direct reading (wet) transmission and engine oil pressure [gauges]." Compl. at 1 (May 20, 2005).

⁶ After requesting and receiving a 30-day extension of time to file a reply, respondent's counsel provided the following response to each of the requests for admission here at issue: "Having made reasonable inquiry, respondent is without knowledge

the Administrator's counsel sent a letter directly to respondent reminding respondent of his continuing obligation to comply with discovery. In the absence of a response, the Administrator's counsel filed a motion to compel discovery from respondent and to deem certain portions of the Administrator's Request for Admissions admitted. As a result of respondent's lack of adequate responses, the law judge ordered respondent to comply with the discovery requests, and deemed all but one of the requests for admission in the Administrator's discovery request admitted. The day after the law judge issued the order deeming all but one of the allegations referenced in the Administrator's Request for Admissions as admitted, the Administrator filed a motion for summary judgment pursuant to 49 C.F.R. § 821.17(d). The law judge granted this motion and ordered a 40-day suspension of respondent's airline transport pilot certificate, based on violations of 14 C.F.R. §§ 91.7(a) and 91.407(a)(2).

A party may file a motion for summary judgment on the basis that the pleadings and other supporting documents establish that no material issues of fact exist, and that the party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d). We have previously considered the Federal Rules of

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or readily obtainable information sufficient to enable him to admit or deny Request for Admission No. [__].” Resp’t Opp’n to Mot. for Summ. J. at 3.

Civil Procedure to be instructive in determining whether disposition of a case via summary judgment is appropriate. Administrator v. Doll, 7 NTSB 1294, 1297 n.14 (1991) (citing Fed. R. Civ. P. 56(e)). In this regard, we recognize that federal courts have interpreted the summary judgment standard as appropriate when no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).⁷

In the case at issue, given respondent's lack of meaningful response to the Administrator's Request for Admissions, and the law judge's subsequent order deeming the essentially uncontested requests for admission as admitted, no genuine issue of material fact exists. Respondent argues that he cannot explain why his counsel provided the ambiguous response to the Administrator's Request for Admissions, and states that he has since hired a new attorney. Respondent also asks the Board to refer to his responses in his answer, rather than his counsel's responses to the Administrator's Request for Admissions. Respondent also argues that the Administrator violated 49 U.S.C. § 44709(c) by not providing him with an opportunity to attend an informal conference to discuss the proposed certificate action.⁸

⁷ An issue is *genuine* if the evidence is sufficient for a reasonable fact-finder to return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). An issue is *material* when it is relevant or necessary to the ultimate conclusion of the case. Id. at 248.

⁸ Title 49 U.S.C. § 44709(c) requires the Administrator to

The Administrator's counsel points out that the Administrator's Request for Admissions addressed all of the allegations in the complaint, and that, upon the law judge's order deeming the allegations addressed in the Request for Admissions as admitted, no genuine, material issue of fact existed. The Administrator's counsel also argues that respondent waived his opportunity to attend an informal conference pursuant to 49 U.S.C. § 44709(c), and includes several exhibits to show that he provided respondent with multiple opportunities to discuss the case in an informal conference. Resp. to Resp't Opp'n to Mot. for Summ. J., Exhibits 2-7.

We have long recognized that law judges, in general, have significant discretion in overseeing discovery. See 49 C.F.R. §§ 821.19(b), 821.35(b); see also Administrator v. Evans, NTSB Order No. EA-4298 at 2 (1994) (citing Administrator v. Wagner, NTSB Order No. EA-4081 (1994), and stating that "[t]he sufficiency of discovery responses is a matter committed to the discretion of our law judges"). Where a party does not comply with discovery requests in accordance with 49 C.F.R. § 821.19,

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provide the certificate-holder with "an opportunity to answer the charges and be heard why the certificate should not be amended, modified, suspended, or revoked."

the law judge has the discretion to impose sanctions.⁹ See,
e.g., Administrator v. Moore, NTSB Order No. EA-4992 at 2
 (2002); Administrator v. Bailey & Avila, NTSB Order No. EA-4294
 at 3 (1994). Ordering uncontested requests for admission to be
 considered true is not an inappropriate sanction.¹⁰

In addition, we conclude that the Administrator allowed
 respondent the requisite opportunity for an informal conference
 in accordance with 49 U.S.C. § 44709(c). The Administrator
 provided several exhibits consisting of correspondence regarding
 the scheduling of such a conference, and respondent does not
 dispute that such correspondence occurred. See Response to
 Resp't Opp'n to Mot. for Summ. J., Exhibits 3-7.

⁹ We note that respondent had three distinct opportunities after the Administrator filed her Request for Admissions to avoid the law judge's discovery sanction order that deemed critical facts admitted. Respondent could have: responded to the discovery request by denying any or all of the Requests for Admissions; responded similarly to the Administrator's counsel's September 9, 2005 letter, in which counsel specifically reminded respondent of his ongoing obligation to respond to discovery requests; or responded to the Administrator's motion to compel and to deem facts admitted, by disavowing his attorney's earlier, inadequate response. Respondent failed to address substantively the Administrator's Requests for Admissions after each of these opportunities. While we acknowledge that respondent temporarily proceeded without counsel, we note that such a situation does not obviate a respondent's obligations with regard to discovery or responses in general in a pending enforcement action. See Administrator v. Casino Airlines, Inc., NTSB Order No. EA-5091 at 1 (2004), aff'd 439 F.3d 715, 718 (D.C. Cir. 2006).

¹⁰ See Fed. R. Civ. P. 36.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decisional order is affirmed; and
3. The 40-day suspension of respondent's airline transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order.¹¹

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

¹¹ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).